No. 16125

IN THE

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STEPHEN GRANAT, as Administrator of the Estate of Mary A. O'Keefe, Deceased,

Appellant,

vs.

WALTER SCHOEPSKI,

Appellee.

BRIEF OF APPELLEE

Upon Appeal From the District Court of the United States, for the District of Montana.

HALL, ALEXANDER & KUENNING,
414 Strain Building,
Great Falls, Montana,
Attorneys for Appellee.

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STATEMENT OF THE CASE

We agree with the first paragraph of Appellants' statement; however, beyond that it is highly argumentative. We think it would be helpful in understanding the issues on these appeals to note:

As a result of the collision on the bridge, the adminis trator of Mary O'Keefe, appointed in Montana, brough a representative action on behalf of her heirs (Cause 179 below) and a survival action for her pain and sufferin (Cause 1799 below). Her husband, Raymond O'Keefe who was in the Buick brought an action for his ow personal injuries and damages (Cause 1800 below). Thes actions were commenced in the State District Court fo Phillips County. Walter Schoepski was and is a residen of Wisconsin and removed these three cases on diversit to the United States District Court for the District o Montana, Havre Division. In due course Schoepski ans wered and counter-claimed for his own personal injurie and damages. The cases were by agreement consolidate for trial. No jury was demanded and the actions wer tried by District Judge W. D. Murray.

On the trial the plaintiffs, and appellants here, relie upon the testimony of Raymond O'Keefe to the genera effect that Schoepski was travelling at a high rate o speed, that Mary O'Keefe was at all times on her ow side of the bridge, travelling about 40-45 miles per hou and had traversed two-thirds of the length of the bridg when Schoepski turned his Pontiac sharply across th center into the path of the Buick. This testimony wa bolstered by the opinion of Douglas Hardesty, the inves tigating State Highway Patrolman, who came upon th scene about an hour after the collision. Large number of photographs and colored stereos were introduced. Som were taken about an hour after the collision, after th Pontiac had been skidded over; some months later. Fro

the Highway Patrolman's measurements and observations it was his opinion that the point of impact was on the O'Keefe side of the bridge.

On the other hand, Walter Schoepski testified that he was proceeding about 40 miles per hour, he was aware that the Buick was on the bridge and was "hugging" the north rail with his eye on the rail so that he didn't actually see the Buick strike his automobile. He was sure that he continued in a straight line on his own side until struck.

Mabel Keough, the driver of a laundry panel truck out of Glasgow was behind the Pontiac and from her vantage point on the slope leading down to the bridge testified that the Pontiac was on its own right hand side and continued in a straight line until struck. She then saw the Buick sway to the south rail and then swerve across the road into the borrow pit on the north side.

Pat West, a lumberman from Saco, was on his way to Malta and behind the Pontiac as it entered the bridge. The Pontiac was at all times on its own right side until it was struck by the Buick. The Pontiac was stopped dead by the collision and then its front end was spun to the south while the rear end was lodged against the north rail of the bridge. After the impact the Buick slammed into the south rail, came toward him to the east end of the bridge, and then swerved in front of him, so that he had to brake very hard to avoid collision, across the road into the borrow pit on the north.

After extensive argument in written briefs the Court found that Walter Schoepski had been exercising due

care on his own side of the bridge and that the Buic
was on the wrong side. Accordingly, the three plaintiffs
claims were dismissed and Walter Schoepski had judgmen
on his counter-claim against the administrator for th
driver of the Buick. The judgment was satisfied befor
the appeals in the two administrator's cases were taker

SUMMARY OF ARGUMENT

I. The Court made no ruling or decision with respec
to the testimony of Highway Patrolman, Douglas Har
desty—for what it was worth his opinion as to the poin
of impact was heard. There was no error and certainl
no prejudice in the trial Judge's confining Hardesty t
facts and observations instead permitting him to speculat
and guess that Walter Schoepski might have been affecte
in his driving by the slope of the road east of the bridg
II. There was no error in refusing the offered testimon
of Sheriff Dove as to some experience of his with refer
ence to the condition east of the bridge.

A. The testimony was offered at a session som
two months after the main trial, held for the sol
purpose of taking the testimony of Witness Keoug
(who was unavailable because of the impendin
birth of her child at the time of trial) and rebutta
thereto. Dove's testimony did not rebut Mrs
Keough.

B. No foundation was laid for Dove's experienc
in approaching this bridge from the east becaus
it was not shown that the speed, type of automobil
or skill of the driver was even similar to th

Schoepski case. Furthermore, the individual experience of others is generally held incompetent in cases of this kind.

C. Appellants and plaintiffs were not prejudiced because it is conceded that Schoepski at least entered upon the bridge on his own side.

III. With respect to the trial Court's findings of fact:

A. The function of this Court begins and ends when substantial evidence appears to support the lower Court directly or by inference.

B. The Buick had as a matter of law, no preference or "right of way" although it may have been first on the bridge.

C. Reasonable minds just cannot say that the Court's finding that the Buick was on the wrong side of the bridge is not fully supported by the testimony of Walter Schoepski, Pat West and Mabel Keough—the latter two wholly disinterested eye-witnesses to the collision in question.

Credibility of witnesses is a matter for the Trial Court.

All of appellant's contentions fall with that crucial finding of fact.

None of the cases cited broadside by appellant are persuasive.

IV. No complaint can now be made of the award of damages to Walter Schoepski for the appellant affected has complied with the judgment and it has been satisfied of record.

ARGUMENT

I.

The Examination of the Highway Patrolman, Dougla Hardesty.

(Appellants' Point 1)

Appellants' first specification of error is that the Cour committed reversible and prejudicial error "in its rulings comments and decisions" in the course of the examinatio of this witness.

At the outset it should be made clear that the Cour made no "ruling" or "decision" which excluded or other wise barred the patrolman's opinion testimony as to th point of impact. The highway patrolman came to the acci dent scene at "10:25 by my watch" (Tr. p. 228). Thi was at least an hour after the accident. He testified a to the position of the vehicles, the damage to the bridge the appearance of the roadway and the measurement which he took. He was asked his opinion as to the poin of impact and after objection and some backing and fillin on the part of appellants' counsel was permitted to giv and did give the opinion that the collision took place "nea the front portion of this Pontiac" and "south of the cente portion of this highway, as I have concluded from wha I saw there" (Tr. p. 243). On cross-examination th effect of this opinion was destroyed when the patrolma conceded that if the Buick were on the wrong side o the road, as appellee's two eye-witnesses testified, an made a right turn to avoid a head-on collision, then th damage would be the same and "you could have this sam result" (Tr. p. 247). After the examination by the par

ties, the Court asked a number of questions the effect of which was that in the officer's opinion the Pontiac had been "driven back and sidewise" and "the Buick must have been travelling with greater force than the other car and it tore on through after connecting here solid enough to damage the front ends as it did, and this car (Pontiac) spun relatively in its same position after the impact, but the other car went eighty feet beyond there." (Tr. pp. 261-263). Again the officer fixed the place of impact in his opinion. (Tr. p. 262).

Even after reading the appellants' brief on the point we are at a loss to understand just what error the trial Court is charged with committing. The use of italics at pages 50 and 51 of the brief would indicate that counsel takes exception to the comment or colloquy made by the Court when objection was made to patrolman Hardesty's attempt to include as the basis for his opinion (which the Court was permitting) his conjecture or speculation as to the effect on the Pontiac of a condition east of the bridge (not therefore covered by the evidence) such that "it is perfectly normal for you to correct. . . ." Defense counsel started to interpose objection and the impartial expert just couldn't wait to get in his lick: "Well, if you don't want to hit the bridge, now, let's put it that way." Here the Court interposed: "Well in the first place, we are away off base. He is now testifying and basing his opinion on something that isn't in evidence, so let's go back, etc." (Tr. pp. 240-241).

No offer of proof was made, then or later. Obviously, the effect of the crown or slant of the road would depend

upon the speed of a particular automobile, its roadability characteristics and the ability of its driver. No suggestion was made as to when Hardesty had driven this road or that he had ever driven toward the bridge from the east in a 1952 Pontiac at a speed of under forty miles per hour (as all witnesses agree) or any other speed. Whatever Hardesty's qualifications as a traffic investigator it is clear that his speculation as to what was "perfectly normal" for Walter Schoepski, in his Pontiac and at his speed on the morning of August 30, 1955 is and was entirely incompetent.

Instead of going back, as the Court suggested, or making an offer of proof, Counsel for appellants immediately plunged right ahead on his own tack as follows:

"Q. Well, are there any *facts* that you have not related about this accident that is required for you to arrive at your conclusion of the place that this accident happened on the bridge?

"A. No, sir, *this portion back here is my own idea.*"

On page 59 of appellants' brief are cited a number of cases going to the proposition the opinion evidence of a traffic officer is admissable as to the point of impact in an automobile collision. As noted at the outset, officer Hardesty was permitted to and did give his opinion in this case—it was not excluded.

Reliance is placed on the Montana decision in *State v. Bosch,* which is reported in 125 Mont. 566, 242 Pac. (2d) 977. In that case a sharply divided Court held that a Montana highway patrolman, who had himself observed the lights of the defendant's automobile, was permitted

to estimate speed from his observation, measured skid marks 181 feet long and the tables furnished by the Northwestern Traffic Institute. The relation of skid marks to speed is, of course, a fairly well developed science. That is a far different thing from testifying how and where a collision took place. This case is much more comparable to *State v. Bast,* 116 Mont. 327, 151 Pac. (2d) 1009, where the Court said:

> "Blake . . . over objection, testified that from his observation of the road and the car after his arrival on the scene, he was led to 'believe that a car would have to be travelling close to fifty miles an hour to cover this ground and cause the damage it did to this car.'
>
> "As before stated, Patrolman Blake did not witness the happening of the accident for at the time it occurred he was at his home in Kalispell some 10 or more miles distant and he certainly did not qualify to testify with any degree of accuracy as to the miles per hour the car was travelling some forty or fifty minutes before he came into the picture. Such guess work, speculation and conjecture *cannot be said to rise to the dignity of evidence* on which to sustain a conviction." (Italics ours).

The basic rule covering the admissability of opinion evidence in the State of Montana is fully discussed in *DeMarais v. Johnson,* 90 Mont. 366, 3 Pac. (2d) 283, where it is said:

> "The general rule is that a witness must state facts, and not opinions or conclusions. An exception to this rule, based upon necessity, exists where the witness possesses special skill or knowledge of the subject-matter, and where the facts are such that inexperienced persons are likely to prove incapable of forming a correct judgment without the assistance of the opinion of such witness. See note in 51 L. R. A. (N. S.) 566.

The exception is contained in our statutes (subdivision 9, § 10531, Rev. Codes 1921) and has been recognized by this Court in proper cases."

(The statute referred to by the Court above is now Section 93-401-27, subd. 9, R. C. M. of 1947.)

Applying the same basic test the Supreme Court of Minnesota has refused the opinion testimony of a deputy sheriff and highway patrolman (both admittedly qualified as experts) as to the cause, place of accident and speed of two colliding vehicles.

Beckman v. Schroeder.
(Minn.) 28 N. W. (2d) 629.

In *Hamre v. Conger* (S. Ct., Mo.), 209 S. W. (2d) 242, the trial Court granted a new trial and that was affirmed because of prejudicial error in admitting the opinion testimony of David E. Harrison, a member of the highway patrol, as to the "point of impact" based upon the location of debris and the conclusion that the point of impact was the center of the debris.

The Court adhered to the fundamental rule that opinion evidence "should never be admitted unless it is clear that the jurors themselves are not capable, from want of experience or knowledge of the subject, to draw correct conclusions from the facts proved." The Court observed:

"That the center of the *debris* falling from two motor vehicles upon impact may not be substantial evidence of the *point* of impact is, we think, in effect, ruled in Schoen v. Plaza Express Co. et al., Mo. Sup., 206 S. W. 2d 536, loc. cit. 539. There, as here, the collision of two motor vehicles was involved and the point of impact was in issue, and the location of the debris was a circumstance for consideration in determining the

point of impact. In the Schoen case the Court said: "Regardless of the position of defendants' vehicle with reference to the east side of the highway when the collision occurred, it would be reasonable to suppose the loosened parts and fragments of the damaged vehicles would be cast to the westward; yet, it could not be stated with reasonable certainty that this would be so in every such situation. The vehicles being of different weight and size; traveling, no doubt, at different speed; and colliding with great force and at an unknown angle —it would be impossible to reason out or mathematically determine just where the broken-off parts would be cast."

"Whatever value the *location* of the debris or the *center* of the debris falling from two motor vehicles upon impact may have upon determining the point of impact is not, in our opinion, a proper subject for expert or opinion evidence. In this age of motor vehicles, knowledge upon such subject is not something not possessed by the ordinary person, hence the opinion evidence of Patrolman Harrison was incompetent, since it invaded the province of the jury."

249 S. W. (2d) 242 at 248.

Such is the rule generally:

Goodrich v. May, (Ore), 255 Pac. 465; Johnston vs. Peairs, (Cal. App.), 3 Pac. (2d) 617; Blash., Cyc. of Auto Law and Prac., Vol. 9 C, Par. 6311 and 6312.

The *Zelayeta case* cited on page 59 of appellants brief (232 Pac. (2d) 579) as the "weight of authority on the subject" does not hold that opinion as to the point of impact was admissable. All it does hold is that, under the circumstances there involved, admission of such opinion was not reversible or prejudicial error.

The case does have some bearing here; for, it does

show that Judge Murray was doing nothing unusual here when he insisted that the highway patrolman's opinion be confined to what he saw and observed and not based on conjectures and speculations. We invite the Court's attention to the limitations firmly imposed by the trial judge in *Zelayeta* at page 576 of the Pacific Reporter.

Without pausing for breath or changing the paragraph appellants' counsel goes from the cases on opinion testimony into "impatience and petulancy" on the part of the trial judge. The case cited, quoted and principally relied upon is *Shopiro* v. *Shopiro,* a divorce case, involving a lengthy colloquy between counsel and the trial judge where attorneys fees to respondent were raised from an announced $5,000.00 to $7,500.00 because appellants counsel tried to be heard and would not stipulate. We respectfully urge this Court to read the *Shopiro* opinion, particularly at pages 64 and 65 of 153 Pac. (2d) and respectfully suggest that when it is compared with the matter complained of here, in italics, (Appellants' Brief p. 51, Tr. p. 241) the mere citation of the Shopiro case is misleading, unbecoming of an attorney of this Court and at least disrespectful.

The *Pratt* case is almost equally inappropriate and the *Chalfin* case is not reported in 236 Pac. (2d) at page 16, or elsewhere in that volume.

II.

The Testimony of Sheriff Dove Offered in Rebuttal.

(Appellants' Point 2).

The contention is that the Court committed reversible error in refusing to permit the rebuttal testimony of

Sheriff Dove respecting a condition of the road east of the bridge which caused motorists to be pulled toward the center of the bridge when driving from the east, westerly, on the highway.

A. The Offered Testimony Was Not "Rebuttal."

To say that the offered testimony was "rebuttal" is a misnomer. When the case was set for trial it was found that an important witness for the defense was about to have a baby and could not testify. Appropriate motions were made and the Court concluded that the main part of the trial would proceed and the case held open until Mrs. Keough's testimony could be obtained. (Tr. p. 76). The trial proceeded from Thursday, October 25, 1956 through Monday, October 29, 1956. The appellants and plaintiffs rested on Saturday, October 27th (Tr. p. 69). The defendants case, in addition to the witness West who had been called out of order on Saturday, continued on Monday. After the testimony of Dr. McKenzie, the defendant rested except for the testimony of Mrs. Keough (Tr. p. 297) and plaintiff proceeded with rebuttal. Raymond O'Keefe testified as the only witness on rebuttal and the following transpired:

"Court: Any further?

"Mr. Doepker: That is it, with the reservation—

"Court: With the reservation to rebut anything new that the witness, Mrs. Keough may present. Well, that's fine. I suppose that we can take the testimony on the 6th of December, but we will have to arrange that date as we find out what the situation is with reference to the birth of her baby, I suppose."

(Court Reporter's Transcript, p. 584, ll. 6-14).

The above seems to have been lost in the shuffle when the record here was printed. It was designated for the record by Paragraph 5 (c) of Appellee's Designation of Additional Contents of Record. The same appears in substance in the Court minutes (Tr. p. 71).

The basis of the defense was fully revealed when the eye-witness, Pat West, was called out of order on Saturday. Thereafter, Sheriff Dove was called in the plaintiffs' case in chief (Tr. p. 68 and p. 213) and was examined at length as to what he did — no mention was made of any condition east of the bridge. Then Douglas Hardesty was called, also on Saturday (Tr. p. 68), when he did testify as to the condition east of the bridge. Now we find in Appellants' brief this remarkable statement:

> "The condition of the record will show that the case was being tried at Havre, Montana. The sheriff of Phillips County resided at Malta, a distance of 90 miles to the east and there was no time to put him upon the stand immediately after the close of the evidence on the part of the defendant, therefore, in the interest of justice and fairness we contend that as long as the evidence had not been permitted on the direct examination at the time that the highway patrolman testified, we should have had the benefit of this testimony on the part of the sheriff, William C. Dove."
>
> (Appellants' Brief, p. 60)

We can not point to the record to say where Sheriff Dove was when it came time for plaintiffs' rebuttal on Monday but certainly counsel had all day Sunday to have brought Dove into Havre—if counsel was not satisfied with Hardesty's testimony on the point.

Neither can counsel say that he was at all mislead as

to the limitations on rebuttal when Mrs. Keough's testimony was received on January 14, 1957. When counsel had concluded his cross-examination, he asked if Mrs. Keough (the appellee's witness) might be excused. Thereupon, appellee's counsel inquired if there was to be any rebuttal and counsel indicated one short witness "on the position of the cars". It was suggested that this would violate the Court's order and the following transpired:

> "The Court: Yes, I thought all the rebuttal and everything was in except for the testimony of this witness and any rebuttal that was necessary as a result of her testimony. *Is that it?*
>
> Mr. Koepker: *That is what this is, your Honor.*
>
> The Court: Very well, call the witness." (Italics ours).
>
> (Tr. p. 322).

Thus, counsel acquiesced in the previous understanding and we submit that Dove's offered testimony as to a condition east of the bridge was quite obviously not germane to any part of Mrs. Keough's testimony. If the offer had been sufficient and the evidence competent, it is true that the trial judge *in his discretion* might have relaxed the procedure, but, no doubt had in mind the practical difficulties and delay attendant upon re-opening the entire case.

B. The Offer Was Not Sufficient to Show the Evidence Admissable.

Even if the experience of others in approaching this bridge might have been admissable under some circumstances, it is plain that no foundation has been laid until it be shown that the conditions and management

of the cars was substantially the same. Illustrative of the point is *Williams v. Holbrook* (Mass.) 103 N. E. 633 which was an action for the death of a boy standing on a sidewalk and struck by a skidding automobile.

> "The plaintiffs expert, having testified in cross-eximination that from his experience in the same street after skidding began it could not be stopped, was asked if he had not 'seen other light machines skid at the place where the accident occurred.' It was discretionery with the presiding judge whether this evidence should be admitted, and its exclusion shows no reversible error (citing cases). Proof moreover that similar cars had skidded did not show their conditions of management, which, of course, were material if such evidence was to have any probative value. French vs. Sabin, 202 Mass. 240, 88 N. E. 845."

That such evidence is not competent at all is held in *McKerall vs. St. Louis—San Francisco Ry. Co.* (Ct. of A., Mo.) 257 S. W. 166. That case involved a train striking the automobile in which plaintiff was riding at a crossing. The Court held:

> "The evidence complained of related to the experience that others had had in passing over this crossing. . . . (Evidence as to condition of the crossing was admissable since negligence in its maintenance was charged).
>
> "But we do not believe that the individual experience of others, in different automobiles and of different makes is competent. There is too much difference, we think, in automobiles, and the skill of drivers to make individual experience competent."

C. In All Events Appellee Was Not Prejudiced.

The evidence as to the condition of the road east of the bridge was designed to give rise to an inference that Walter Schroepski might have gotten on the wrong side

when he made the "correction" to enter the bridge. The issue here, of course, is not what might have happened but what did happen. As will be discussed in the following section, two eye-witnesses, Mabel Keough and Pat West, both in a position to see and know, testified that from their observation Walter Schoepski's Pontiac entered the bridge on its own right hand side and continued on that side in a straight course. The alleged condition of the highway was *east* of the bridge and if it had any effect on the Pontiac it would have been *east* of the bridge or as it entered the bridge. Counsel for Appellant concedes that this did not happen for at page 72 of Appellant's brief it is said:

> "Mrs. Keough did not pretend to fix the relative positions of the cars at the place of collision. She testified that the Pontiac entered the bridge on its own side. All witnesses agree that this was a fact — that Mr. Schoepski came upon the bridge on his own side."

We submit that all of the complaining concerning Dove's belatedly offered testimony is a "tempest in a teapot" for the condition to the east clearly didn't have anything to do with the admitted operation of the Schoepski automobile.

III.

There Is at Most a Conflict in the Evidence and the Findings and Judgment of the Trial Court Are Not "Clearly Erroneous."

(Appellants' Points 3-6 and 9-13).

Reduced to essence the trial Court here found that Walter Schoepski was proceeding on his own right hand side of the bridge, without negligence on his part, when

he was struck by the O'Keefe Buick. Appellant contends that the trial Court should have found that the O'Keefe Buick was on its own side of the bridge when it was struck by the Schoepski Pontiac.

A. The Rule Applicable to This Review.

We take it to be settled beyond all dispute that on appeal this Court will not try this case *de novo* or substitute its judgment on the facts where on conflicting evidence it can not be said that the trial Judge, with his superior opportunity to judge credibility, is not clearly erroneous. In applying Rule 52(a) of the Federal Rules of Civil Procedure, this Court has said:

> "Much has been written as to the proper construction of Rule 52(a) of the Federal Rules of Civil Procedure, but we think its application to the instant case is clear. The rule does not disturb the long followed principle that the judge or jury which has seen and heard the witnesses is better qualified to weigh their testimony than is a reviewing tribunal and that findings of fact of the trial body will not be set aside unless clearly erroneous."
>
> Western Union Teleg. Co. v. Bromberg, (C.C.A. 9) 143 Fed. (2d) 288, 290.

"A presumption of correctness attaches to the findings of the District Court. United States v. Foster, 9 Cir., 1941, 123 F. 2d 32, and under Rule 52(a), Federal Rules of Civil Procedure, 28 U.S.C.A., the trial judge's findings of fact will not be set aside unless clearly erroneous. The rule applicable here in the light of the conflicting character of the evidence in the record be-before us has been aptly stated in Federal Savings & Loan Ins. Corp. v. First Nat. Bank, Liberty, Mo., 8 Cir., 164 F. 2d 929, 932, in this language:

> 'We are not at liberty to substitute our judgment for that of the trial court and on appeal that view

of the evidence must be taken which is most favorable to the prevailing party, and, if, when so viewed, the findings are supported by substantial competent evidence they should be sustained'."

Paramount Pest Control Service v. Brewer (C.A. 9) 177 Fed. (2d) 564, 567.

To the same effect:

Wingate v. Bercut (C.C.A. 9) 146 Fed. (2d) 725;

Penn. v. Commissioner (C.A. 9) 219 Fed. (2d) 19;

United States v. Marshall (C.A. 9) 230 Fed. (2d) 183.

B. The Buick Had No Preference or "Right-of-Way" on the Bridge.

At page 70 of Appellant's Brief it is argued:

"Coming over the knoll shown in 3-D Stereo, plaintiff's exhibit number 25 and seeing the Buick approaching in its own lane about 40 feet west of the bridge, he should have permitted the Buick automobile to pass over the bridge before he entered the same."

Compare also Plaintiff's Proposed Finding of Fact 6 d., (Tr. p. 29) to the same effect.

The traffic laws of the State of Montana imposed no duty on either driver to refrain from entering this bridge and our statutes may be searched from beginning to end without finding any preference or right of way applicable.

Where, as here, the bridge would permit the passage of two meeting vehicles the applicable rule would be prescribed by Section 32-2151, R.C.M. of 1947, as amended by Sec. 48, Ch. 263, L. 1955, to the effect that upon all roadways of sufficient width a vehicle shall be driven upon the right half of the roadway, and Section 32-2152, which provides as follows:

"Passing vehicles proceeding in opposite directions. Drivers of vehicles proceeding in opposite directions shall pass each other to the right, and upon roadways having width for not more than one (1) line of traffic in each direction each driver shall give to the other at least one-half (½) of the main-traveled portion of the roadway as nearly as possible.'

32-2152, R.C.M. 1947, as amended by Sec. 49, Ch. 263, L. 1955.

There is in Montana no specific speed limit applicable to bridges or similar structures. The rule of "reasonable care under the conditions then and there existing" as emunciated by the following statute would be applicable:

"Speed restrictions—basic rule. (a) Every person operating or driving a vehicle of any character on a public highway of this state shall drive the same in a careful and prudent manner, and at a rate of speed no greater than is reasonable and proper under the conditions existing at the point of operation, taking into account amount and character of traffic, condition of brakes, weight of vehicle, grade and width of highway, condition of surface, and freedom of obstruction to view ahead, and so as not to unduly or unreasonably endanger the life, limb, property, or other rights of any person entitled to the use of the street or highway. * * *

"(c) The driver of every vehicle shall, consistent with the requirements of paragraph (a), *drive at an appropriate reduced speed* when approaching and crossing an intersection or railway grade crossing, when approaching and going around a curve, when approaching a hill crest, *when traveling upon any narrow* or winding roadway, and when *special hazard exists* with respect to pedestrians or other traffic or by reason of weather or highway condition." (Italics ours).

32-2144, R.C.M. (En. Sec. 41, Ch. 263, L. 1955).

Thus, under the law of Montana, Walter Schoepski

had every right to enter upon that bridge as he did and he had every right to assume that his half of the way would be clear. There were only two real questions so far as responsibility for this horrible collision were concerned, to-wit:

(a) Who failed to drive at an appropriate reduced speed as commanded by the statute and common sense?

(b) Who failed to drive on the right hand side of the roadway?

C. Competent, Credible Evidence by Witnesses in A Position to See and Know Clearly Support The Trial Court's Finding.

The whole fabric of appellants' contentions must stand or fall upon the sustainability of the Trial Court's Finding of Fact III (Tr. pp. 42 and 43). If that finding is sustainable the conclusions of law based thereon, the Court's refusal to amend and the separate judgments in the three cases consolidated for trial *must* stand. Appellants' brief contains no argument to the contrary.

The whole finding should be examined, but the crucial portion thereof is as follows:

". . . that the bridge was of sufficient width for the automobiles to pass each other safely; that the defendant and cross-complainant was operating his automobile on said bridge at the time of the collision aforesaid in a careful and prudent manner and on his own side of the road; that the said Mary A. O'Keefe, in operating her automobile upon said bridge, negligently crossed over the center line and her said automobile collided with the automobile owned and driven by the defendant and cross-complainant; that the proximate cause of said collision was the negligence of said Mary A. O'Keefe in crossing over the center line of

said highway and into the lane of travel of said defendant and cross-complainant."

(Tr. p. 43.)

Aside from Raymond O'Keefe, whom the Court did not give credence (Order, denying motions and new trial, Tr. p. 58), the only testimony based upon direct observation of the collision was produced by the defendant and appellee.

While we knew that a man in a green station wagon had been an eye-witness his identity was not known until Vern Kapphan, one of plaintiffs' witnesses on cross examination, revealed that "the lumber yard man in Saco had a station wagon there." That man was Pat West who was produced from Outlook, Montana the next day (Tr. pp. 189, 174). On the morning of the accident West left Saco and was driving west toward Malta. Near the top of the hill which slopes down to the bridge he overtook and came up to the Schoepski Pontiac. His whole testimony, both on direct and cross, should be carefully considered (Tr. pp. 174-212) but the following excerpts are enlightening in view of the Court's finding:

"Q. Were you—did you ever come up upon that vehicle more closely?

A. Yes, just before coming to the bridge.

Q. And just tell us what you saw when you—just before coming to the bridge, or what you did?

A. I was going to pass the Pontiac car that was in front of me.

Q. It was a Pontiac in front of you?

A. Yes. And being over the road before, I remembered that bridge just ahead, and pulled in behind.

Q. And at that time, would you be able to judge the speed of the Pontiac?

A. I was still maintaining my speed—I would imagine 45.

Q. And they were traveling 45, and you were maintaining your speed. What did you do then?

A. I immediately had to start to slow down.

Q. Now, at that time, where was your car with reference to the center line?

A. I pulled in behind the Pontiac at that time.

Q. Where was the Pontiac with reference to the center?

A. They were on the right hand side of the road.

Q. And proceeding in which direction?

A. Westerly direction.

Q. And then what did the Pontiac do?

A. It continued to brake down before it hit the bridge, before it came to the bridge, before it entered the bridge.

Q. And what did you do?

A. I then really had to slow down, I braked down."

(Tr. pp. 175-176).

* * *

"Q. Are you able to estimate the speed of the Buick when you saw it?

A. I would say 60, 65.

Q. And then what happened?

A. They collided on the bridge, and the Buick was thrown up against the guard rail and bounced off and careened across the road immediately in front of my car.

Q. You say the Buick was careened against the guard rail?

A. Yes, it careened against the guard rail on the right side.

Q. And then where did it go—the guard rail on the right side.

A. On the Buick's right side.

Q. With reference to north and south—

A. It would be the south side.

Q. On the south guard rail, and then the Buick proceeded where?

A. It careened across the road and went into the north borrow pit immediately in front of my car."

(Tr. p. 177).

* * *

"Q. Now, going back to the place where you came into the bridge when the accident happened, the Pontiac, where was it with reference to the lane of travel you were in?

A. The Pontiac was on the right side of the road.

Q. Did it continue that way?

A. Yes, All while I followed it up until the time it entered the bridge.

Q. On its own right-hand side of the road?

A. Yes."

(Tr. p. 187).

Cross examination:

"Q. And in the collision, they came together on the right hand side of the bridge?

A. Yes, the car was on the right hand side of the bridge. They didn't both hit in the right hand side.

Q. Well, let's change it then this way: The right hand side, as far as your side of the highway was concerned, would be the north side?

A. Yes.

Q. And the Buick, traveling in a proper lane, would be on the south side, wouldn't it?

A. Yes.

Q. All right, then the collision occurred on the north half of the highway on the bridge, is that right?

A. Yes.

Q. And that is as you saw it?

A. Yes.

Q. Now, did the position change in the collision?

A. Yes, the cars were twisted in the road, and the Buick was slammed up against the railing."

(Tr. p. 201-202).

* * *

"Q. So, do I understand that you didn't get the exact position when they came together?

A. I saw the cars as they hit, and the Pontiac was continued on the right hand side of the road.

Q. All right, let's get some cars and see if you can give us an illustration. You take two cars here—we will call the yellow one the Pontiac and the red one the Buick.

A. Yes.

Q. Let's call the line here (indicating) the approximate center line of the bridge, and illustrate for his Honor your recollection of how the cars came together?

A. Well, as they came—this is the bridge (indicating).

Q. Yes, this is the bridge.

A. The Pontiac came in on its side of the road, the right hand side, the north side of the road. As the Buick came in on to the road, the collision was hit here, and the Buick was thrown this way—

Q. Well, let's have the cars come together, please, as near as you can, how did they come together?

A. They must have locked right in here, or in this position because this car was on the right hand side of the road. The accident couldn't have happened that way. I was watching the back of this car. That was the one I was afraid of running into, that was why I was braking down.

Q. I thought you was braking down so the Buick wouldn't run into you?

A. Well, I had to stay out of the way of this Pontiac to start with. That was before the accident."

(Tr. pp. 204-205).

* * *

"Q. And, then, the way you have it illustrated there, they were both on their own side at the time of the collision?

A. No, I say that the Pontiac went on to the bridge on the right hand side of the road—

Q. Yes.

A. And the collision occurred. Now, this car, I wasn't watching where it was going, whether it was over on the wrong side. It must have been to hit the Pontiac, because the Pontiac was on the right hand side of the road.

Q. Coming on the bridge?

The Court: Let me get this straight, what you are saying, that you didn't see the impact, you just saw the car ahead of you?

A. No, I saw the impact, your Honor, yes, but to put the wheels of this car across that road, I couldn't say that because I wasn't watching the line, but I saw the impact, I saw the Buick hit the bridge railing, and that is when it come right around in front of my car.

Q. Well, now, let's get that part of your recollection straight. You say you think that the cars then hit

in such a position that the Buick careened over after the collision—

A. After the collision, the Buick hit the bridge railing.

Q. Then, the collision occurred further down the bridge so that the Buick careened after the accident, is that it?

A. Yes, it hit the bridge after it hit the Pontiac.

Q. After it hit the Pontiac. And then the Pontiac, was the Pontiac driven back towards you?

A. The Pontiac was just lodged in there that way. It twisted in between the Buick and the rail when it hit, and when it hit, it just swooped it around, it spun it in the road.

Q. And the Pontiac was spinned after it was struck by the Buick and went in against the guard rail, is that right?

A. Yes.

Q. And the Buick careened off and hit the side of the bridge, is that correct?

A. Yes."

(Tr. pp. 205-206).

The testimony of Pat West, standing alone, would more than support the Finding III of the Trial Judge. But, there was still more, for Mabel Keough was also an eye-witness. She was the driver of a laundry panel truck on her regular pick-up and delivery route from Glasgow to Malta. She came to a stop when she had just started down the hill leading to the bridge. From that vantage point this is what she saw:

"Q. And when you came to a complete stop, where was this light colored car ahead of you?

A. I believe it was approaching the bridge. I don't know if it was on the bridge or approaching it, I cannot remember.

Q. And what can you tell the Court as to where it was with reference to the right or left hand side of the road?

A. Well, it was on the right side of the road.

Q. Did something happen shortly thereafter?

A. Yes, it did.

Q. Will you just tell the Court what happened?

A. Well, the only thing that I can remember that is clear in my mind is I saw the Buick sway and kind of hit the bridge, and then it just swove out and hit into the borrow pit on the north side.

Q. On which side?

A. On the north side of the road.

Q. At that time that the Buick swerved and came across to the north side of the bridge, was the Pontiac on the bridge?

A. Yes.

Q. And where was the Pontiac at that time with reference to its side of the road?

A. It was on its own side."

(Tr. p. 300-301).

* * *

Re-direct:

"Q. Mr. Doepker also showed you this photograph, No. 3 of Plaintiffs' Exhibit 4, I believe it is, do you know how the Pantiac got in the position shown in that photograph?

A. Well, what do you mean?

Q. Well, just before the accident, was the Pontiac facing and pointing in that direction?

A. No, it was going straight.

Q. It was going straight?

A. Yes.

Q. Now, do you know how the front end got turned at the angle shown in the photograph?

A. No.

Q. It wasn't going that way ahead of you?

A. No, as far as I could see, it was on its own side of the road.

Q. And continuing straight ahead?

A. Yes."

(Tr. p. 320).

These two completely disinterested eye-witnesses, square with Walter Schoepski himself:

"I took my foot off the gas and eased on the brake to slow down. I saw an automobile coming from the west towards me, and I continued on after passing that sign. Just where the automobile was that was coming from the west, I have a fair idea. Well, I would say it was about to enter the bridge at the same time that I did, to the best of my knowledge. Well, I knew it was a narrow bridge and I was trying to hug the rail and stay on my own side of the highway because I knew I was on a narrow bridge, on the right side of the highway. I stayed on the right side of the highway. I continued to hug the rail of the bridge which has been identified as the north rail of the bridge. My car didn't sway, my car didn't jump like a frog."

(Tr. p. 285).

Cross examination:

"I don't recall that the car pulled you towards the left as you came down that last drive to the bridge. I would say that the car did not pull me towards the left, and as I was sitting there driving, I was on the left side of the car, and I did not try to make towards the center of the bridge to avoid the north rail; I tried to stay as close as I could to the north rail; that is what I was watching. I wouldn't say that I wanted to

miss the north rail, too, or that I had to turn a little bit to start with to miss the north rail on the highway, and I don't think my car pulled me towards the center approaching the bridge I am talking about."

(Tr. p. 290-291).

Certainly the evidence of any one of the three witnesses above is "substantial" and fully supports the Trial Court's finding. This Court has recently held:

"When a finding is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether, considering the whole record, there is substantial evidence which supports the conclusion reached by the trier of fact. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court."

Fegles Const. Co., Limited et al. v. McLaughlin Const. Co. (C.A. 9) 205 Fed. (2d) 637, 639.

This Court has consistently held that it will not review questions of "credibility."

Pekovich v. Coughlin,
(C.A. 9) 258 Fed. (2d) 191, 193;

Parker v. Title and Trust Co.,
(C.A. 9) 233 Fed. (2d) 505, 508.

Where a finding involves the credibility of witnesses and is supported by substantial evidence it is conclusive upon appeal.

Overman v. Loesser,
(C.A. 9) 205 Fed. (2d) 521, 524.

In view of the above rules it would seem pointless to winnow and sift through the mass of testimony here to point out:

1. The numerous conflicts, evasions and apparent

falsehoods in the testimony of Raymond O'Keefe which certainly justified the Court in not believing him.

2. That the photographs taken at the scene were taken at least an hour after the accident, after the Pontiac had been skidded to the north and apparently moved back and after several vehicles had passed over the bridge.
3. That because of the movement of the Pontiac and the replacement of loose parts *before* Highway Patrolman Hardesty arrived his opinion was not reliable.

Since the function of this Court must begin and end when it finds substantial evidence supporting the finding, we do not extend this brief by analyzing the whole record to show that reasonable minds could hardly find differently than Judge Murray did.

Appellant cites a number of cases, on page 72 of the brief, in support of the proposition that testimony contrary to the physical facts will not support a verdict or decision. None of the cases are applicable to the situation here. Illustrative of the whole group are the holdings in the Montana cases cited: In the *Morton* Case (33 Pac. (2d) 262), plaintiff ran into the rear of a truck pushing a stalled car in a fog bank. Plaintiff recovered on his testimony that the truck and stalled car were at an angle across the 24 ft. highway blocking the entire traversable portion. The physical evidence showed that plaintiff's auto had squarely struck the rear of the pushing truck which would, of course, have been impossible if the truck

were across the highway at an angle as plaintiff had testified.

In the *Incret Case* (86 Pac. (2d) 12), plaintiff was a passenger in an auto with a frost covered windshield, which ran into the side of a train nearly 2,000 ft. long as the center of the train was passing over a crossing in a well lighted street in the City of Butte. Plaintiff recovered on the testimony of the driver and himself that the rays of light at the crossing formed a "curtain" which the lights of his car could not penetrate and he was thereby prevented from seeing the passing train. The Court said such testimony was so utterly contrary to common sense and everyday experience that it was not worthy of consideration.

A careful reading of all of the other cases cited (on page 72), except *Dahl v. Spotts* which we do not find, reveals that they are all equally inapplicable. Most of them turn on a situation where the testimony of the witness relied upon was *impossible* on the uncontradicted physical facts or inherently unbelievable. Thus, in the *Poland Case* (93 Pac. (2d) 380) the plaintiff testified that she looked but did not see a street car in plain sight; the Court held that she was guilty of contributory negligence in spite of her swearing to the contrary.

We have nothing like the cases cited in this case. The accuracy of important "physical facts" were themselves in dispute (Order on Motions to Amend, etc., Tr. pp. 57-58). Furthermore, appellants' own expert, Hardesty, agreed that if the Buick were on the wrong side of the road "you could have this result" (Tr. p. 247). In other

words, the physical evidence was not incompatible with the eye-witness accounts.

Appellant winds up his brief with the citation of four cases purporting to recognize the testimony of a highway patrolman as "strong testimony." (Appellants' Brief p. 73). An examination of the cases will show that they hold no such thing. The *Jackson Case* (86 So. 469) simply holds that opinion testimony by a qualified witness as to speed based upon skid marks left on dry pavement was admissable. The *Vallejo Case* (147 Pac. 238) was a condemnation case and the *Manney Case* (180 Pac. (2d) 69) involved the cause of a fire. The *Haeussler Case* (260 Pac. (2d) 8) was an appeal from a manslaughter conviction. A highway patrolman who arrived within minutes was permitted to testify as to point of impact but the Court certainly does not say, or even intimate, that such opinion controls all else or was particularly sacrosanct.

Where the facts are like those here, the great weight of authority has been extremely cautious in admitting opinion testimony and even more cautious in giving it, or physical facts, any certain conclusion. Expert testimony reconstructing a collision from physical and mathematical facts is not favored by the Courts.

Moniz v. Betencourt,
(Cal. App.) 76 Pac. (2d) 535, 539;

Linde v. Emmick,
(Cal. App.) 61 Pac. (2d) 338, 343;

Romann v. Bender,
(Minn.) 252 N. W. 80, 82.

One of the cases frequently cited is *Fishman v. Silva,* (Cal. App.) 2 Pac. (2d) 473. That case explains the

reason for the reluctance of the Courts and the language is most appropriate here:

> "It is needless to add, as in all such cases, there is presented a wide field for argument, the main theme of which is physical facts and the so-called immutable laws of physics. Contentions based on these foundations are usually not convincing, strange as it may seem, for the simple reason that in partisan presentation there is an ever-present temptation to forget essential facts which do not fit in. For instance, where it is argued that, where there is a contact of two bodies in a given position, the direction of the applied force will control the position of the bodies after the impact, any rule or law, in the abstract, will be found of little value when we have the additional factors or each body in motion and controlled by independent agencies. Experience has shown the futility of attempted demonstration in accident cases; there are too many varying factors. Among these variants we may class indefinite rate of speed, condition of the highway, judgment or lack thereof in the drivers, a direct blow or a glancing one, and the balance or equilibrium of each car at the time of impact."

(2 Pac. (2d) 473, at 474).

IV.

Questions Touching the Award of Damages to Walter Schoepski in Causes 1798 and 1799 Are Moot.

(Appellants' Points 7 and 8).

Complaint is made of the Trial Court's Conclusions of Law IV and V (Tr. pp. 47 and 48) to the effect that Walter Schoepski was entitled to damages on his counterclaims against the Administrator of the Estate of Mary O'Keefe in Causes 1798 and 1799. Judgment was entered accordingly (Tr. p. 51).

The record shows that those judgments were satisfied

on March 12, 1958 (Tr. p. 73-74).

The general rule is that an appeal becomes moot and will usually be dismissed where the judgment has been satisfied or complied with by the appellant.

5 C. J. S. 424, Sec. 1354(6);

Travis County v. Matthews,
(Tex. C. App.) 221 S.W. (2d) 347;

Padgitt v. Young County,
(Tex.) 229 S. W. 459.

There seem to be no cases squarely applicable in Montana, but the following are persuasive:

An appeal from a writ of mandate, subsequently obeyed by the appellant, was dismissed as fictitious.

State v. Napton,
10 Mont. 369, 25 Pac. 1045;

After an appeal from distribution of an estate, appellants executed receipts for their awards satisfying the decree; this deprived the appellate Court of jurisdiction.

In re: Black's Estate,
32 Mont. 51, 79 Pac. 554.

The case of Raymond O'Keefe (Cause 1800 below) of course, falls in a different category; but, certainly it would be a monstrous thing if by some legerdemain or manipulation, both principals to a head-on collision should recover damages from each other.

CONCLUSION

We respectfully urge that Appellants' contentions with respect to the taking of evidence are a "grasping at straws" to get some question of law into these appeals. No error was committed by the Court. All other contentions are bottomed in objection to the Court's finding of

fact that the Buick was the vehicle on the wrong side of the bridge. Open minds must agree that the great preponderance of competent, credible evidence supports that finding. Even if it would, this Court cannot go further, draw its own inferences and substitute its findings for those of the Trial Judge. On the record the findings, conclusions and judgments of the Trial Judge are clearly correct and should be affirmed.

Respectfully submitted,
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